

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

JOSHUA OSMUN KENNEDY,	)	
	)	CASE NO. C10-1216-RAJ-MAT
Petitioner,	)	(CR-08-354-RAJ)
	)	
v.	)	
	)	REPORT AND RECOMMENDATION
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	
_____	)	

Petitioner Joshua Osmun Kennedy, proceeding through counsel, moves pursuant to 28 U.S.C. § 2255 to vacate, set aside, or correct his 60-month sentence for transportation of child pornography. (Dkt. 1.)<sup>1</sup> In this § 2255 motion, filed four months after filing a direct appeal, Mr. Kennedy contends that he received ineffective assistance of counsel because trial counsel should have moved to suppress the photographic evidence of child pornography found on his computer. Because Mr. Kennedy has failed to demonstrate extraordinary circumstances for considering the § 2255 motion during the pendency of his direct appeal, the Court recommends DISMISSING this habeas petition without prejudice to refile it after the direct appeal is decided. The Court also recommends DENYING the issuance of a certificate of appealability.

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<sup>1</sup> The Court cites “Dkt.” when referring to the § 2255 motion, and to “CR Dkt.” when referring to the underlying criminal matter *United States v. Kennedy*, CR08-354-RAJ (filed Oct. 23, 2008).

01 It is unnecessary to hold an evidentiary hearing.

## 02 **BACKGROUND**

03 The facts relevant to resolving the present § 2255 motion are not in dispute. In the late  
04 evening of November 9, 2007, Mr. Kennedy arrived on a flight from Mexico City to Seattle,  
05 and was referred to a secondary inspection at the airport because his trip itinerary had included  
06 Colombia, a source country for narcotics. (CR Dkt. 160 (Tr. Aug. 25, 2009), at 5–6, 23.) An  
07 officer turned on Mr. Kennedy’s computer and opened an image file that displayed what the  
08 officer believed might be an underage female. (*Id.* at 12–15.) The officer detained Mr.  
09 Kennedy’s computer and placed it into an evidence locker at the airport. (*Id.* at 16–17.) On  
10 the next business day, November 13, 2007, the computer was transported from the airport to the  
11 Office of Immigration and Customs Enforcement (“ICE”) office in Seattle so that the computer  
12 could be examined forensically in a manner that would assure the computer had not been  
13 tampered with by government officials. (*Id.* at 55.) When that examination uncovered  
14 images that appeared to constitute child pornography, the government sought a search warrant,  
15 which was obtained three days later. (*Id.* at 56.) On and after November 16, 2007, the  
16 government searched the computer pursuant to the warrant and discovered approximately 5,000  
17 images of children engaged in sexual acts. (*Id.* at 99–100.)

18 In August 2009, Mr. Kennedy was convicted by jury of possession of child pornography  
19 and transportation of child pornography. (CR Dkt. 117, 120.) In February 2010, the district  
20 court vacated the possession count as a lesser-included offense and sentenced Mr. Kennedy to  
21 60 months of imprisonment on the transportation of child pornography count. (CR Dkt. 129.)  
22 Mr. Kennedy filed a notice of appeal on March 5, 2010. (CR Dkt. 134.) That appeal remains

01 pending. On July 28, 2010, Mr. Kennedy filed the present § 2255 motion. (CR Dkt. 164;  
02 Dkt. 1.) Mr. Kennedy contends that while the government had the authority to conduct the  
03 search on November 9, 2007, all subsequent searches violated the Fourth Amendment. Mr.  
04 Kennedy alleges that he received ineffective assistance of counsel because trial counsel never  
05 moved to suppress the evidence obtained in the subsequent searches.

### 06 DISCUSSION

07 The government contends that Mr. Kennedy has failed to demonstrate extraordinary  
08 circumstances to justify circumventing the general rule that a § 2255 motion should not be  
09 considered during the pendency of an appeal. The government is correct.

10 In *Feldman v. Henman*, 815 F.2d 1318, 1320 (9th Cir. 1987), the Ninth Circuit noted  
11 that “[a] district court *should not* entertain a habeas corpus petition while there is an appeal  
12 pending in this court or in the Supreme Court.” *See also United States v. Deeb*, 944 F.2d 545,  
13 548 (9th Cir. 1991); Rules Governing § 2255 Proceedings in the District Courts, Rule 5, Adv.  
14 Comm. Notes (“‘We are of the view that there is no jurisdictional bar to the District Court’s  
15 entertaining a Section 2255 motion during the pendency of a direct appeal but that the orderly  
16 administration of criminal law precludes considering such a motion absent extraordinary  
17 circumstances.’”) (quoting *Womack v. United States*, 395 F.2d 630, 631 (D.C. Cir. 1968)).  
18 “The reason for this rule is that disposition of the appeal may render the [petition] unnecessary.”  
19 *Feldman*, 815 F.2d at 1320 (quotations omitted). Although the general rule of forbearance is  
20 not jurisdictional, the petitioner seeking to bring a § 2255 motion during the pendency of an  
21 appeal bears the burden of demonstrating that “‘extraordinary circumstances’ outweigh the  
22 considerations of administrative convenience and judicial economy.” *United States v. Taylor*,

01 648 F.2d 565, 572 (9th Cir. 1981).

02 Mr. Kennedy has failed to demonstrate that extraordinary circumstances justify  
03 considering his habeas petition during the pendency of his appeal. To the contrary, Mr.  
04 Kennedy's arguments illustrate precisely why the rule of forbearance exists. Mr. Kennedy's  
05 claim of ineffective assistance of counsel is based entirely on claimed violations of the Fourth  
06 Amendment. Mr. Kennedy is procedurally barred from raising Fourth Amendment claims in  
07 the present habeas petition because he has the full and fair opportunity to raise them directly in  
08 his pending appeal. *See Stone v. Powell*, 428 U.S. 465, 494 (1976) (holding, in a 28 U.S.C.  
09 § 2254 habeas petition, that Fourth Amendment claims are not cognizable on collateral review  
10 so long as the defendant has a "full and fair" opportunity to litigate the claims); *see also United*  
11 *States v. Johnson*, 457 U.S. 537, 562 n.20 (1982) (acknowledging the applicability of *Stone v.*  
12 *Powell*'s procedural bar to § 2255 motions); *United States v. Hearst*, 638 F.2d 1190, 1196 (9th  
13 Cir. 1980) (applying *Stone v. Powell*'s procedural bar to a § 2255 motion). Should Mr.  
14 Kennedy succeed on direct appeal—based on his Fourth Amendment or other claims—the  
15 present habeas petition would be unnecessary. Moreover, though ineffective assistance of  
16 counsel claims are usually evaluated via § 2255 motions, nothing precludes the Ninth Circuit  
17 from reviewing ineffective assistance of counsel on direct appeal when, as here, the record is  
18 sufficiently complete to permit adequate evaluation. *See United States v. Hanoum*, 33 F.3d  
19 1128, 1131 (9th Cir. 1994) (holding that although ineffective assistance of counsel is usually  
20 reached in a § 2255 motion because of the need to develop facts outside of the record, "[t]his  
21 court can consider a claim of ineffective assistance of counsel on direct appeal if the record is  
22 sufficiently complete to allow us to decide the issue"). Mr. Kennedy's argument involves only

01 legal analysis of the extant record: he alleges that the second search was not supported by  
02 reasonable suspicion and was not, in any event, a legitimate extended border search because it  
03 was held later and at a different time; and that the evidence obtained from the warrant searches  
04 should be excluded as fruit of the poisonous tree. Mr. Kennedy never suggests that trial  
05 counsel chose not to move to suppress based on evidence outside of the record; rather, he  
06 contends that counsel performed deficiently because competent counsel would have identified  
07 obvious Fourth Amendment violations.

08       The Court rejects Mr. Kennedy's unsupported, conclusory argument that it would be  
09 more administratively efficient for this Court to consider his claim of ineffective assistance of  
10 counsel claim in habeas proceedings before the Ninth Circuit issues its decision in the direct  
11 appeal. There is no impediment to the Ninth Circuit evaluating on direct appeal the Fourth  
12 Amendment and ineffective assistance of trial counsel claims unless, as the government  
13 suggests, appellate counsel has failed to raise these issues. If appellate counsel has indeed  
14 abandoned these claims, once the direct appeal has been resolved and Mr. Kennedy then files a  
15 new § 2255 motion, the Court will at that time be in a better position to evaluate ineffective  
16 assistance of trial *and* appellate counsel.

17       Mr. Kennedy argues that the Court should hold an evidentiary hearing to examine an  
18 inconsistency in the testimony by the officer who initially searched his computer at the airport,  
19 but that discrepancy was fully explored at trial and, in any event, Mr. Kennedy does not  
20 challenge the propriety of the airport search or the discovery of what the officer believed to be a  
21 photograph of an underage female. (CR Dkt. 160, at 18–19 (Tr. Aug. 25, 2009) (officer  
22 testifying that his initial report referred to files named “Romania” when they were in fact named

01 “Chopsuey” because the desktop contained files employing both names); Dkt. 11-1 (excerpt of  
02 the Tr. Aug. 25, 2009).) Mr. Kennedy is not, therefore, entitled to an evidentiary hearing. *See*  
03 *Shah v. United States*, 878 F.2d 1156, 1158 (9th Cir. 1989) (holding that if a prisoner’s  
04 allegations do not state a claim for relief or are so palpably incredible as to warrant summary  
05 dismissal, a court need not hold an evidentiary hearing). Mr. Kennedy is not entitled to the  
06 issuance of a certificate of appealability because an appeal would not raise material and  
07 debatable questions about his entitlement to circumvent the rule of forbearance. *Miller-El v.*  
08 *Cockrell*, 537 U.S. 322, 342 (2003). Mr. Kennedy should address whether a certificate of  
09 appealability should be issued in his written objections, if any, to this Report and  
10 Recommendation.

### 11 CONCLUSION

12 The Court recommends DENYING Mr. Kennedy’s 28 U.S.C. § 2255 motion and  
13 DISMISSING the habeas petition without prejudice to refiling after the direct appeal is decided.  
14 The Court also recommends DENYING the issuance of a certificate of appealability. The  
15 record shows that an evidentiary hearing is unnecessary. A proposed order is attached.

16 DATED this 29th day of November, 2010.

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18 

19 Mary Alice Theiler  
20 United States Magistrate Judge  
21  
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